Virginia Law Register

VOL. XV.] MARCH, 1910. [No. 11.

DEATH BY WRONGFUL ACT, NEGLECT, OR DEFAULT IN VIRGINIA.*

I. THE VIRGINIA STATUTE.

The Virginia statute is as follows (Va. Code 1904):

Sec. 2902. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem against said ship or vessel, or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (1870-71, p. 27.)

Sec. 2903. Every such action shall be brought by and in the name of the personal representative of such deceased person and within twelve months after his or her death, but if any such action is brought within said period of twelve months after said party's death, and for any cause abates or is dismissed without determining the merits of said action, the time said action is pending shall not be counted as any part of said period of twelve months, and another suit may be brought within the remaining period of said twelve months as if such former suit had not been instituted. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten

*The references are to Cooley on Torts (Student's edition by Lewis) and to Chase's Cases on Torts (2d edition).

thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, or child, or, if there be no wife, husband, or child, then to the parents, brothers, and sisters of the deceased. But nothing in this section shall be construed to deprive the court of the power to grant new trials as in other cases. (1870-71, p. 27; 1904, p. 110.)

Sec. 2904. The amount recovered in any such action shall be paid to the personal representative, and after the payment of costs and reasonable attorney's fees, shall be distributed by such personal representative to the wife, husband, and child, or, if there be no wife, husband, or child, then to the parents, brothers, and sisters of the deceased in such proportions as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, child, parent, brother, or sister, the amount so received shall be assets in the hands of the personal representative to be disposed of according to law. This and the preceding section are subject to this proviso: Where there is a widowed mother of the deceased and a widow but no children of the deceased, the amount recovered shall be divided between the mother and the widow in such portions as the jury or the court may direct. (1870-71, p. 27; 1904, p. 110.)

Sec. 2905. The personal representative of the deceased may compromise any claim to damages arising under section twenty-nine hundred and two, with the consent of the persons who would be entitled to the damages recovered in an action therefor brought by such representative under section twenty-nine hundred and three; or, if any such persons are incapable, from any cause, of giving consent, the personal representative may make the compromise, with the approval of the judge of the circuit court of the county, or the circuit or corporation court of the corporation, wherein such an action is allowed by law to be brought. Such approval may be applied for by the personal representative, on petition to the said judge, in term or vacation, stating the compromise, the terms thereof, and reasons therefor, and convening the parties in interest. If the judge approve the compromise, and the parties in interest do not agree upon the distribution to be made of what has been or may be received by the personal

representative under the said compromise, or if any of them are incapable of making a valid agreement, the judge may direct such distribution as a jury might direct under section twenty-nine hundred and three as to damages awarded by them. In other respects, what is received by the personal representative under the compromise shall be treated as if recovered by him in an action under the section last mentioned. When the judge acts in vacation, he shall return all the papers in the case, and orders made therein, to the clerk's office of his said court. The clerk shall file the papers in his office as soon as received, and forthwith enter the orders in the order book on the law side of the court. Such orders, and all the proceedings in vacation, shall have the same force and effect as if made or had in term.

Sec. 2906. The right of action under sections twenty-nine hundred and two and twenty-nine hundred and three shall not determine nor the action when brought abate by the death of the defendant or the dissolution of the corporation when a corporation is the defendant; and where an action is brought by a party injured for damage caused by the wrongful act, neglect, or default of any person or corporation and the party injured dies pending the action the action shall not abate by reason of his death, but his death being suggested it may be revived in the name of his personal representative. (1877-8, p. 221; 1893-4, p. 83.)

II. Construction of the Virginia Statute.

1. *Historical.* The original Virginia statute, giving a right of action for "death by wrongful act, neglect, or default," was enacted January 14, 1871 (Va. Acts, 1870-'71, p. 27), the common law, which allowed no civil action for damages for the "death of a man," being changed on account of the recent disaster, involving loss of life, at Jerry's Run, on the Chesapeake & Ohio Railway, some miles east of the Greenbrier White Sulphur Springs. For the common-law doctrine referred to above, see *Cooley,* § 142; *Chase,* 623; *Hutchinson on Carriers,* (2nd Ed.), § 777. For the English statute (known as Lord Campbell's Act, passed in 1846), on which the American statutes are founded, see *Cooley,* § 143.

2. *Death of servant, wife, child.* At common law, the superior

in the relation of master and servant, husband and wife, and parent and child (viz., master, husband, parent), could recover damages for an injury caused to the inferior in the relation (viz., servant, wife, child) by a third person's wrongful act, neglect, or default, by which there was a loss of service or *consortium*. And if such injury, after an interval of languishing, caused the death of the inferior, the superior could recover damages for the loss of service or *consortium* intermediate the injury and the death. But the dogma, "no action for the death of a man," and the maxim "*actio personalis moritur cum persona*, forbade any recovery by the superior for loss of service or *consortium* subsequent to the inferior's death, and caused thereby. See Baker *v.* Bolton, 1 Camp. 493, by Lord Ellenborough; Osborn *v.* Gillett, L. R. 8 Ex. 88; 2 Va. Law Reg. 3, article entitled, "A Bit of Legal History," by H. R. Preston.

In the recent case of Stevenson *v.* Ritter Lumber Co., 108 Va. 575 (62 S E. 351), a father brought an action to recover damages for the death of his minor son, by reason of the defendant's wrongful act, neglect, and default, and claimed that, under the Virginia statute set out above (§ 2902), he was entitled to recover for the loss of the services of his son from the time of his son's death to the time when he would have reached his majority.

It was held that the statute had no application to such a case as between superior and inferior, which remained as at common law as to damages subsequent to the inferior's death; and the father was denied recovery, as there had been no appreciable interval between the injury and the death. The court said: "The only effect of the statute is to change the rule of the common law that, in pursuance of the maxim *actio personalis moritur cum persona*, no right of action existed in favor of the heirs, distributees, or personal representatives of a deceased person for damages for his wrongful death * * *; the single change in the common law wrought by the statute being that the right of action is given by it solely to the personal representative of the deceased for the benefit of the wife, husband, parent, or child of the deceased." (But now by Va. Acts, 1904, p. 110, "brothers and sisters" of the deceased are added to the class of beneficiaries.)

3. *When no action for death.* In construing § 2902, above, attention must be paid to the words, "and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action * * *, and to recover damages in respect thereof." On this condition, the "person who would have been liable if death had not ensued, shall be liable in an action for damages notwithstanding the death of the person injured, and although the death may have been caused under such circumstances as amount in law to a felony."

(1) Suppose the deceased, for whose death the action is brought, was guilty of contributory negligence. Then as the act, neglect or default of the defendant is not "such as would (if death had not ensued) have entitled the injured party to maintain an action," no action can be brought under the statute by his administrator to recover damages on behalf of the beneficiaries who would otherwise have been entitled. Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324 (41 S. E. 732); Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 350 (49 S. E. 439); Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50 (51 S. E. 211); Pendleton *v.* Richmond, etc., R. Co., 104 Va. 813 (52 S. E. 754); *Cooley,* § 150; *Hutchinson,* § 789*b*.

(2) But suppose the deceased was not guilty of contributory negligence (as in case, e. g., of a child too young to be capable thereof), but there was contributory negligence on the part of the sole beneficiary of the deceased, (his father or mother, as the case might be) proximately contributing to the injury causing his death. If now the administrator of the child sues to recover damages for his death, alleging that it was caused by the defendant's wrongful act neglect, or default, does the beneficiary's contributory negligence bar the administrator's action?

On this point there has been some conflict of opinion, but now by the decided weight of authority it is held that by the beneficiary's negligence the administrator's action is barred. And this for the reason that otherwise the beneficiary would profit by his own wrong. In order to prevent this result, the courts read into the statute the beneficiary's freedom from contributory negligence as a condition precedent to the administrator's recovery of damages on his benalf. *Cooley,* § 150; *Hutchinson,* § 789*b*; Richmond, etc., R. Co. *v.* Martin, 102 Va. 201, 45 S. E.

894 (repudiating contrary *dictum* in Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454); Davis *v.* Seaboard, etc., R. Co., 136 N. C. 115 (48 S. E. 591). But see Consolidated etc., Co. *v.* Hone, 59 N. J. Law 275 (35 Atl. 299; s. c., on appeal, 60 N. J. Law 444, 38 Atl. 759), where it is held in the lower court (the judges being equally divided on appeal) that as the deceased was himself free from contributory negligence, and if he had not died could have recovered damages for his injury, then by the very words of the statute the defendant is liable when the death does ensue, and the beneficiary's negligence is irrelevant.

(3) But the words, "if the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and to recover damages in respect thereof" are construed as applicable, and as defeating the administrator's recovery, not only when, as in the above cases, by reason of the deceased's or beneficiary's negligence, there never was any right of action for the death caused by the injury, but also when although there once was, potentially, such right of action, it has been lost by the conduct of the person injured previous to his death. Thus it is well settled that the administrator's action for the death of the person injured is barred if such person has compromised for the injury, or accepted satisfaction therefor previous to his death. *Cooley*, § 150; *Hutchinson*, § 789*b*; Louisville, etc., R. Co. *v.* McElwain, 98 Ky. 700 (34 S. W. 236, 34 L. R. A. 788, and subject-note); Southern Bell, etc., Co. *v.* Cassin, 111 Ga. 575 (37 L. R. A. 694).

4. *Death pending suit.* Va. Code, § 2906, above, declares: "where an action is brought by a party injured for damages caused by the wrongful act, neglect, or default of any person or corporation, and the party injured dies pending the action, the action shall not abate by reason of his death, but his death being suggested, it may be revived in the name of his personal representative." These words have been construed as follows:

(1) In Birmingham *v.* Chesapeake, etc., R. Co., 98 Va. 548 (37 S. E. 17), it is said, referring to § 2906: "The object intended to be accomplished was, we think, to give the right of revival, in cases where the plaintiff died pending the action, without regard to the cause of death. Before the amendment

[Va. Acts, 1893-'94, p. 83], an action to recover damages for personal injuries could not be revived except in those cases where the plaintiff died as the result of the injuries complained of; whereas, under the law as amended, if the plaintiff die, pending the action, no matter from what cause, the action may be revived."

Suppose, then, the injured person institutes an action for damages, and dies pending the action from a disease, say smallpox, in nowise connected with, or caused by, his injury. Then, by § 2906, as above construed, the action can be revived in the name of the administrator, and continue to judgment; but manifestly, as there has been no *death* by the defendant's wrongful act, the revived action must be the continuation in all respects of the common-law action already begun by the deceased for damages for his injury, irrespective of death. Hence such action would not come under the "death by wrongful act" statute; and the recovery of damages (if any) would be assets of the deceased's estate, and liable for his debts, the recovery not being limited to $10,000, and going, after payment of debts, to the next of kin by the statute of distributions.

(2) But suppose when the injured person has brought an action, not supposing his hurt to be mortal, he dies pending the action *from the injury received,* and the action is revived in the name of his administrator. Is such action, under § 2906, the same common law action, with the consequences explained under (1) above, or is it the statutory action for death, governed by the same rules in all respect as if the action had been first brought by the administrator of the deceased after his death?

This question is answered in Brammer *v.* Norfolk, etc., R. Co., 107 Va. 206 (57 S. E. 593), where it is held that it is the *statutory* action. There Brammer instituted an action for damages for injury caused by the wrongful act, neglect and default of the defendant, but died in consequence of such injury pending the suit. The action was revived in the name of Brammer's administrator, but recovery was defeated by reason of Brammer's contributory negligence. See Brammer *v.* Norfolk, etc., R. Co., 104 Va. 50 (51 S. E. 211). Afterwards an action was brought for the same injury by Brammer's administrator, on the theory that the former action had been, both when brought

and after revival, a common-law action, and so was no bar to a second action under the statute. But the court held (107 Va. 206, above) that the judgment in the first action was *res adjudicata* to the second, using this language:

"But one action can be maintained to recover damages for injury [resulting in death] caused by the wrongful act, neglect, or default of another person or corporation, as there is but one cause of action in such a case; and whether that action be brought by the injured party in his lifetime and revived, after his death during the pendency of the action, in the name of his personal representative, or a new action be brought within the statutory period, as provided in the statute, but one recovery can be had, and that for the next of kin nominated in the statute, where they exist, as in this case. Therefore, if there be a recovery in the action revived, or if it be adjudicated in that action that the injured party had no right of action at his death, it is conclusive of [against] the right to maintain another action to recover damages for the same injury."

5. *Statute gives new right of action.* Under "Death by Wrongful Act," etc., statutes, a question has arisen as to the nature of the statutory action. Is it the survival, by force of the statute, of the common-law action which the deceased would have had for his injury if death had not ensued therefrom? Or is it a new action, dependent, it is true, on a right of action in the deceased at the time of his death, but nevertheless distinct therefrom, and not a survival thereof? See on this point *Hutchinson,* § 789, *Cooley,* § 144.

In Anderson *v.* Hygeia Hotel Co., 92 Va. 687 (24 S. E. 269), it was decided that § 2902, above, creates a new and distinct cause of action. The reasoning of the court is as follows:

"Where the right of action which the deceased person had in his lifetime survives his personal representative sues as the legal owner of the personal estate which has passed to him in course of law, and the recovery is for the benefit of and constitutes assets of the estate of the decedent, with the consequent liability for the payment of his debts. The right of action of the personal representative is the same that was possessed by the deceased in his lifetime. It proceeds on the same principles, is sustained

by the same evidence, and the measure of the recovery is the same.

"But very different is the right of action given by the act in question. The act requires the suit to be brought by and in the name of the personal representative, but he by no means sues in his general right of personal representative. He sues wholly by virtue of the statute, and in respect of a different right. His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased, who are designated in the statute.

"If the effect of the statute is, as was contended, to cause the right of action of the injured person to survive, the suit by his personal representative would be to recover damages for the injury the deceased had sustained, and the detriment caused to his estate. The same kind of evidence would be necessary and admissible to support the action that would be proper if the injured person himself were suing. There would be the same elements of damage for the consideration of the jury in assessing the damages. The evidence would mainly relate to and the damages be for the physical and mental suffering of the deceased, and the injury and loss genera ly sustained by him and his estate. But in a suit by the personal representative under the statute the evidence would primarily relate to, and the damages be, not only for the pecuniary loss the wife, husband, parent, or child [and brothers and sisters by the amendment of § 2904], as the case might be, had sustained, but it would be proper for the jury, in computing the damages, to take also into consideration the grief and mental anguish of such relatives, and their loss in being deprived of the care, attention, and society of the deceased, and to include therefor in the verdict such sum as the jury might deem fair and just [not exceeding $10,000].

"The limit of recovery, too, is different. In the one case [at common law for injury] the amount of the recovery is limited only by the amount of the loss that may be proved. In the other [under the statute for death], the recovery cannot in any case exceed $10,000. Then, again, if the action were only a survival of the right of action of the injured person, the

recovery would constitute assets of his estate, and be subject to the payment of his debts. Whereas it is expressly declared by the statute that the amount recovered under the statutory right of action, except where there are no such kindred as are designated by the statute, shall be "free from all debts and liabilities [of the deceased"]. See, also, Brammer *v.* Norfolk, etc., R. Co., 107 Va. 206 (57 S. E. 593), explaining Anderson *v.* Hygeia Hotel Co., above.

6. *Measure of damages.* As to the measure of damages for death by wrongful act, it is held in England and in the United States generally that the damages are limited to the *pecuniary* loss that has been sustained by the beneficiaries. *Cooley,* § 151; *Hutchinson,* § 784. But in Virginia, construing the language of § 2902, "The jury in any such action may award such damages *as to it may seem fair and just,* not exceeding $10,000," it was held in Matthews *v.* Warner, 29 Gratt. 570, that the jury is not confined in assessing damages to mere pecuniary loss and injury to the beneficiaries, but can take into consideration their mental suffering caused, for example, as in that case, to a mother by the death of her son. This was followed in Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; and instructions were approved that the jury could add to the pecuniary loss to a mother from the death of her son (1) compensation for the loss of his care, attention, and society to his mother, and (2) such further sum as the jury may deem fair and just by way of solace and comfort to his mother for the sorrow, suffering, and mental anguish occasioned to her by his death.

These two cases, as to the measure of damages, have been repeatedly followed in Virginia. See Portsmouth Street R. Co. *v.* Peed, 102 Va. 662 (47 S. E. 850); Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356 (49 S. E. 439). In Pocahontas Collieries Co. *v.* Rukas, 104 Va. 278 (51 S. E. 449), the following instructions to the jury were approved by the Court of Appeals:

"If you believe that the plaintiff is entitled to recover in this case under the law and the evidence, then in ascertaining the damages of the plaintiff you may consider:

"(1) The pecuniary loss sustained by the widow and infant children of Anton Rukas by his death, fixing the same at such

sum as would be equal to the probable earnings of the said Anton Rukas, taking into consideration the age, business capacity, experience, and health of the deceased, during what would probably have been his lifetime had he not been killed.

"(2) By adding thereto compensation for the loss of his care, attention, and society to his widow and children.

"(3) By adding such further sum as you may deem fair and just by way of solace and comfort to his said wife and children for the sorrow, suffering, and mental anguish occasioned to them by his death."

In Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324 (41 S. E. 732), the instruction as to damages was in the usual form except that the jury were told that they could add damages for "the mental and physical anguish of the *deceased;*" and this instruction was approved by the Court of Appeals. The judgment for the plaintiff was reversed on other ground, and this part of the instruction may not have received deliberate attention. According to the reasoning in Anderson *v.* Hygeia Hotel Co., *ante*, the mental and physical anguish of the deceased would seem to be irrelevant as an element in the measure of damages of the beneficiaries, unless as evidence to enable the jury to estimate the mental anguish of the beneficiaries, where the death of a husband or father, for example, occurs, not instantaneously, but after an interval of suffering, and under harrowing circumstances.

In Chesapeake, etc., R. Co. *v.* Ghee's Adm'x (Va.), 66 S. E. 826, the widow of the deceased, testifying as a witness, was permitted, over objection, to answer questions concerning the pecuniary condition of the deceased, the object being to show his poverty; and this was held to be reversible error, citing Southern R. Co. *v.* Simmons, 105 Va. 651 (55 S. E. 459); Pennsylvania R. Co. *v.* Roy, 102 U. S. 451. The court said: "We are of opinion that this evidence was irrelevant and improper, and should have been excluded, since it was not material to any issue in the case. Such evidence was calculated to excite the sympathy of the jury, or, as stated by some of the courts, to stimulate their sympathy; and this sympathy was well calculated to influence the jury, not only as to the *quantum* of damages they should allow, but in the determination of the

question whether the case upon the evidence was for the plaintiff or the defendant. The principle that such evidence is presumed to have wrongfully affected the verdict seems to be settled by the decisions of this court."

In Norfolk, etc., R. Co. *v.* Spencer, 104 Va. 657 (52 S. E. 310), it is held that standard tables of mortality may be introduced in evidence in order to ascertain the probable duration, but for the injury, of the life of the deceased. And see, also, Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356 (49 S. E. 439). But in Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362 (41 S. E. 726), it was said: "We do not regard it as essential that mortality tables be proven in the case. These tables were made for the purpose of life insurance and annuities, where the very shortest time is fixed as affecting pecuniary risks. They are regarded as falling short, in most instances, of the actual duration of human life."

7. *Classes of beneficiaries.* As to the beneficiaries of the recovery for death by wrongful act, etc., the present Virginia statute declares (§ 2904) that the amount recovered shall, after the payment of costs and reasonable attorney's fees, be distributed by the personal representative "to the wife, husband, or child, or if there be no wife, husband, or child, then to the parents, brothers, and sisters of the deceased, in such proportions as the jury may have directed; or if they have not directed, according to the statute of distributions; and shall be free from all debts and liabilities of the deceased."

The original statute did not include brothers and sisters among the beneficiaries and parents were placed in the same class with "wife, husband, and child" of the deceased, among whom the distribution was to be in the proportions directed by the jury. But by the present statute (§ 2904, amended by Acts of 1904, p. 110), there are two classes of beneficiaries, viz., (1) a *preferred* class, consisting of wife, husband, and child, and (2) a *deferred* class, consisting of parents, brothers, and sisters; and while the jury have discretion (see § 2903) to apportion the recovery among the members of the class entitled thereto, the members of the deferred class are not to take at all, except in the absence of all the members of the preferred class. In one case however, the priority of the preferred class must be set aside by the jury, and a member of the deferred class (mother)

allowed to come in with a member of the preferred class (wife). For by the proviso to § 2904: "Where there is a widowed mother of the deceased, and a widow but no children of the deceased, the amount recovered shall be divided between the mother and the widow in such portions as the jury or the court [where by consent of parties the judge tries the case without a jury] may direct."

Under §§ 2903, 2904, above, an interesting question arises as to the disposition of the damages when the jury have failed to direct (as under § 2903 they might have done) in what proportions the damages awarded shall be distributed to the wife, husband, or child of the deceased, or if there be no wife, husband, or child, then to the deceased's parents, brothers, and sisters. By § 2904 it is declared that if the jury have not directed the proportions among the members of the preferred or deferred class, as the case may be, then the amount recovered shall be distributed "according to the statute of distributions." But *to whom* is the recovery to be distributed according to the statute of distributions? Is the distribution confined to the enumerated members of the preferred or deferred class, so that the statute should be interpreted as if its language were as follows: "To the wife, husband, and child in such proportions as the jury have directed, or if they have not directed, then [to *wife, husband,* and *child*] according to the statute of distributions;" and, if there be no wife, husband, or child, then "To parents, brothers, and sisters, in such proportions as the jury have directed, or if they have not directed, [to *parents, brothers,* and *sisters*] according to the statute of distributions? Or, on the failure of the jury to direct the proportions among the members of one or the other class, are the enumerated members to be ignored as such, and the distribution to be made to those entitled under the statute of distributions, as the next of kin to the deceased, whether they are or not members of the named class of beneficiaries?

To the writer it seems clear that the former view is the true construction of the statute, and that it was never intended, in any case, to allow relatives outside of the described classes (as a grandchild, or a nephew, or more remote relative of the deceased) to share with those enumerated in one or the other

class of beneficiaries. The amount received by such unnamed relative would then be "free from all debts and liabilities of the deceased." But a relative outside of the class of enumerated beneficiaries can share death damages, it is believed, only when there is "no wife, husband, child, parent, brother, or sister;" in which case the statute declares that "the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law;" and thus, of course, liable for the debts of the deceased. But this view is opposed to the decision of the Circuit Court of the City of Richmond, in Pinchum *v.* Southern R. Co., 10 Va. Law Reg. 62, where it is held by the learned judge that on the failure of the jury to direct the proportions among the class of beneficiaries the amount recovered is to be distributed, irrespective of the class, to those entitled as next of kin by the statute of distributions, free from the debts and liabilities of the deceased.

8. *Aliens as beneficiaries.* As to whether the beneficiaries under statutes giving an action for "death by wrongful act," etc., can be alien relatives of the deceased, resident in another State of the Union, or in a foreign country, has been the subject of some controversy. In Pocahontas Collieries Co. *v.* Rukas, 104 Va. 278 (51 S. E. 499), where the cause of death was in Virginia, and the beneficiaries were aliens resident in West Virginia, the court held that the right of aliens domiciled in the United States, though non-residents of Virginia, to the benefits and remedies afforded by § 2902 and § 2904 of the Va. Code is "sustained by authority, and in accordance with sound policy and justice."

In Low Moor Iron Co. *v.* La Bianca, 106 Va. 83 (55 S. E. 532), the beneficiaries were aliens resident in a foreign country, Sicily, subjects of the King of Italy, and it was held that such aliens were also entitled as beneficiaries under the Virginia statute. The court quotes with approval this language from Alfson *v.* Bush Co., 182 N. Y. 393 (75 N. E. 330, 108 Am. St. Rep. 815): "The damages are imposed upon a negligent employer as compensation to those who suffer by his act, and there is no valid reason, as it seems to us, why they should not be paid to the survivors, whether residing here or in some foreign juris-

diction. The statute not only benefits the survivors, but protects the laboring man as it tends to enforce observance by the employer of the rule requiring him to furnish his servant a safe place in which to work. The laborer, leaving wife and children behind him, and coming here from abroad, has a right to enter into the contract of employment fully relying on the statute. The conflict of authority in England and our sister states leads us to deal with this question on principle, and to base our answer to it on reasons that are weighty and controlling."

9. *Conflict of Laws.* Under the conflict of laws, an interesting question arises where the cause of death occurs in one State, but the action therefor is brought in another. It was at one time supposed that the new statutory right of action for "the death of a man," in derogation of the principles of the common law, was in its nature penal, and so enforceable only under the law of the State where the cause of death occurred. *Cooley,* § 145; *Hutchinson,* § 789*a*; *Chase's Cases on Torts* (2d Ed.) 683, note to Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971 (14 S. E. 838). But this view, as the above citations show, is now repudiated by the weight of authority, and the recognized doctrine is, as laid down in Nelson *v.* Chesapeake, etc., R. Co., *ante,* that an action to recover damages for a death caused by the wrongful act of another, though statutory only, may be maintained in another State than that in which the injury was committed, if such action is not inconsistent with the laws or public policy of the state in which it is brought or prejudicial to its interests. It is, therefore, sufficient to maintain the action in Virginia, for example, if Virginia and the other State in which the injury causing death occurred have similar statutes giving a right of action for death by wrongful act, neglect, or default. But it must be remembered that the right of action is by the statute of the State where the injury occurred; and that the other State, having jurisdiction over the person of the defendant, enforces this foreign right by comity in its forum, but in accordance with the foreign law. Norfolk, etc., R. Co. *v.* Denny, 106 Va. 383, 56 S. E. 321 (following Nelson *v.* Chesapeake, etc., R. Co., *ante*); Dowell *v.* Cox, 108 Va. 460, 62 S. E. 272 (where death has been caused in a sister State the law of that State governs as to the extent of

the remedy); Hedrick *v.* Southern R. Co., 136 N. C. 510, 48 S. E. 836 (brakeman killed in Virginia by overhead bridge); Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445; 14 Am. St. Rep. 353-355, note; 56 L. R. A. 193, note.

10. *Statute of Limitations.* As to the time within which an action must be brought for death by wrongful act, etc., the Virginia Statute (§ 2903) enacts: "Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death." But this period of limitation, unlike the ordinary statutes of limitation to actions on contract and tort, does not merely affect the *remedy,* but enters, organically and integrally into the constitution of the new right of action (unknown to the common law) which the statute creates, and permits to be enforced, provided the action is brought within the statutory period. Time thus becomes of the essence of the right, and the right itself is extinguished if no action is begun within the prescribed period. It follows, as a corollary of the above, that the declaration must show, as an element of the plaintiff's case, that the action is brought within the prescribed time after the death; and if it does not do so, objection may be taken by demurrer. And if such allegation of time is made, the contrary may be shown under the general issue of "not guilty" without a special plea. It also follows that the period of limitation is that of the State where the cause of death occurred, and not that of the State where the action is brought. The *lex fori* governs *remedy,* but this is a question not of remedy, but of right. Manuel *v.* Norfolk, etc., R. Co., 99 Va. 188 (37 S. E. 957); Dowell *v.* Cox, 108 Va. 460 (62 S. E. 388); Taylor *v.* Cranberry, etc., Coal Co., 94 N. C. 525; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813 (26 S. E. 431); The Harrisburg, 119 U. S. 199; McCartney *v.* Tyrer, 94 Va. 198 (26 S. E. 419); Savings Bank *v.* Powhatan Clay Co., 102 Va. 274 (46 S. E. 294); 3 Va. Law Reg. 63.

It may be added, in conclusion, that in Louisville, etc., R. Co. *v.* Clarke, 152 U. S. 230, it is held that the rule of the common law as to criminal responsibility for death—that it must occur within a year and a day after the injury—has no application to a civil action for damages under "death by wrongful act" statutes.

Also, in Hoover *v.* Chesapeake, etc., R. Co., 46 W. Va. 268 (33 S. E. 224) it is held that though the deceased's right of action for his personal injury was already barred at the time of his death, yet the action by the administrator for the death is not thereby precluded. The court says: "In personal actions for injury, the bar of the statute precludes the *remedy,* but does not satisfy the wrong. A presumption that the guilty party would rely upon the statute of limitations to avoid making satisfaction for an injury done is too violent to justify the inference that the legislature had in contemplation the bar by limitation of the personal right of action [i. e. of the deceased for his injury if he had survived] in the enactment of the section under consideration" [i. e. the section giving the administrator a right of action for the death "when the party injured might have maintained an action if death had not ensued"]. And this effect of the statute upon the *remedy* of the deceased if he had not died is distinguished from cases where the deceased had *no cause of action* at his death, by reason of a compromise or release by him in his life time.

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